

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN TAYLOR,

Defendant-Appellant.

UNPUBLISHED
February 28, 2012

No. 300542
Wayne Circuit Court
LC No. 10-005659-FH

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1), assault with intent to do great bodily harm less than murder, MCL 750.84, and three counts of felonious assault, MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 12-1/2 to 60 years for the assault with intent to commit CSC and assault with intent to do great bodily harm convictions, and 58 months to 15 years for each felonious assault conviction. He appeals as of right. We affirm.

At trial, defendant admitted striking the primary complainant once with his fist and three or four times with a hammer in the bedroom of her home, and then swinging the hammer toward the other complainants as he made his way to the front door. The trial involved competing versions of the events that led to defendant striking the primary complainant. On appeal, defendant argues that the trial court erred in admitting evidence that he sexually assaulted two women in the 1990s, which the prosecutor offered to show a scheme or plan in regard to defendant's attack on the primary complainant.

This Court reviews a trial court's decision regarding the admissibility of other-acts evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A trial court's decision on a close evidentiary question is not an abuse of discretion. *People v Smith*, 282 Mich App 191; 772 NW2d 428 (2009).

MRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, but permits such evidence for other purposes, such as proof of intent or to show a scheme, plan, or system in doing an act. Here, the prosecutor offered the evidence for the purpose of establishing that defendant assaulted the primary complainant with the intent to commit criminal sexual penetration by showing a

common scheme or plan. Defendant's intent to commit sexual penetration was a disputed issue in the case and was material to the charged offense of assault with intent to commit criminal sexual penetration. *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

"Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission." *Mardlin*, 487 Mich at 622. The theory of relevance that a defendant "employed a similar plan, scheme, or system in doing an act," requires "that the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 621. "[D]istinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

The present case and the two prior sexual assaults were similar because they involved defendant suddenly attacking women whose trust he had gained after establishing a friendship. In the present case, the primary complainant described defendant's attack as occurring "like out of the blue" during the first evening the couple spent together. The complainant testified that they had no prior sexual relationship, and defendant had not made any sexual advances before the incident. The first woman to testify about a prior assault had been defendant's neighbor and had socialized with him as part of a group consisting of her boyfriend, defendant, and his girlfriend. As with the primary complainant, this neighbor did not have a prior sexual relationship with defendant. With each woman, defendant used his friendship relationship to gain access to the woman's home where the assault occurred.

The second woman who testified about a prior assault knew defendant because he was involved in a relationship with the woman's friend. This woman also had not had any prior sexual relationship with defendant. Although the attack of this woman occurred in a car, as in the other cases, it occurred suddenly and without warning, and defendant used his friendship with the victim to place himself at that location. In each of the prior cases, defendant stated that he hit the other woman in self-defense, just as he claimed in the present case.

Despite some differences in the attacks, the trial court did not abuse its discretion in determining that the circumstances of the prior sexual assaults were sufficiently similar to show a common plan or scheme to establish a trusting relationship with a female, and to then launch a surprise and unsuspecting attack. The assaults were logically relevant to show that defendant attacked the primary complainant with the intent to sexually assault her, which was a material issue in the trial. The evidence of defendant's sexual assaults on two other women was damaging to defendant's case, but only because it was probative of the critical issue of defendant's intent. This is not the type of "unfair" prejudice proscribed by MRE 403. The trial court's cautionary instruction concerning the appropriate use of the testimony limited any danger for unfair prejudice caused by the evidence. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Thus, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and the trial court did not abuse its discretion in allowing the evidence.

Defendant also argues that the trial court denied him a fair trial by belittling and scolding him during his cross-examination of the primary complainant. Defendant further notes that the trial court inaccurately referred to the testimony of the primary complainant. Defendant did not preserve this issue with an objection to the trial court's conduct at trial. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1995); see also *People v Jackson*, ___ Mich App ___, ___ NW2d ___ (Docket No. 285532, issued May 17, 2011), slip op at 7. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999); *Jackson*, slip op at 7.

A court must be careful that its comments or conduct do not pierce the veil of judicial impartiality and thereby unduly influence the jury against a defendant. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). In this case, the trial court's instruction to defendant to limit his responses to objections was innocuous. Defendant is correct that the court mistakenly stated that the primary complainant had already indicated that she did not remember when she told the police or the prosecutor about her drug use. However, that point was insignificant, and standby counsel had the opportunity to clarify the issue in his cross-examination of the witness and defendant had another opportunity on recross-examination. The jury was not likely to perceive the court's chastisement of defendant as a reflection of the court's assessment of credibility, particularly considering that the court also essentially chastised the witness for her rhetorical remark to defendant a few questions later. Defendant has not established that the trial court's conduct or remarks amounted to a plain error affecting his substantial rights.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey